

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
)	
)	
)	
IN THE MATTER OF: CONSTROVERSY)	DECISION
)	
SOUTH CAROLINA DEPARTMENT)	
OF SOCIAL SERVICES AND SOUTH)	
CAROLINA JUDICIAL DEPARTMENT)	
)	CASE NO. 2013-204A/B
v.)	
)	
HEWLETT-PAKARD CORPORATION)	
AND HEWLETT-PACKARD STATE AND)	
LOCAL ENTERPRISE SERVICES, INC.)	POSTING DATE:
)	March 15, 2013
SOLICITAION NO. 07-S7279)	
CHILD SUPPORT ENFORCEMENT)	
SYSTEM AND FAMILY COURT CASE)	
MANAGEMENT SYSTEM)	

This matter came before the Chief Procurement Officer for Information Technology Management pursuant to a request from the South Carolina Department of Social Services and the South Carolina Judicial Department (collectively “the Agencies”) under the provisions of S.C. Code Ann. §11-35-4230, for an administrative review of a contract controversy with Hewlett-Packard Corporation and its subsidiary Hewlett-Packard State and Local Enterprise Services, Inc. (collectively “HP”), regarding a contract for development of child support enforcement and family court case management software.¹ Pursuant to SC Code Ann. § 11-45-840, the CPOITM delegated this matter to the Chief Procurement Officer for Construction (hereinafter “CPO”). On October 25, 2012, the CPO received from HP a Motion to Dismiss certain claims asserted by the Agencies. On November 21, the Agencies filed their answer in opposition to HP’s motion. Both parties filed subsequent memoranda on the motion. On February 12, 2013, the CPO heard oral arguments on HP’s Motion to Dismiss certain claims.

¹ The State has also stated that “HPSLES should be debarred from future contracts with the State . . .” Except for the following, the CPO will not address this request in the context of the current process, which is being conducted pursuant to Section 11-35-4230, not 11-35-4220. Absent a separate request, a separate probable cause hearing, and compelling proof of the need for immediate suspension under Section 11-35-4220, the CPO will not entertain this issue until the entire administrative process for resolving contract disputes has been exhausted. Generally, see Sections 11-35-4220 and 11-35-310(34) (“Suspension’ means the disqualification of a person to receive invitations for bids, requests for proposals, or the award of a contract by the State, for a temporary period pending the completion of an investigation and any legal proceedings that may ensue because a person is suspected *upon probable cause* of engaging in criminal, fraudulent, or seriously improper conduct or failure or inadequacy of performance which may lead to debarment.”) (emphasis added).

PROCEDURAL BACKGROUND

The Agencies's request for resolution of a contract controversy sets forth two sets of claims, one setting forth various claims of breach of contract and another setting forth a claim for equitable and remedial relief. HP's Motion to Dismiss certain claims only addresses the first set of claims. For convenience sake, the CPO has divided these two sets of claims into Case Number 2013-204A ("Material Breach") and Case Number 2013-204B ("Incidents") respectively. HP's Motion to Dismiss only addresses claims and associated requests for relief found in Case Number 2013-201-A.

HP's Motion to Dismiss asserts that certain claims and requests for relief in that Case are not ripe for adjudication and/or improperly seek an advisory opinion.² Specifically, HP asserts:

1. The Agencies' request that the CPO determine whether HP has breached the Contract such that the Contract should be terminated is not ripe and requests an advisory opinion since the Agencies have not terminated the Contract;³
2. The Agencies' request for reimbursement of all federal penalties for failure to timely complete the CFS Project is premature because the deadline for completion has not arrived and until such time, it is impossible to determine responsibility for any penalties assessed;
3. The Agencies' request for reimbursement of all expenses, penalties, or costs in connection with an OCSE declaration of a "failed project" is premature since OCSE has not declared the Project a "failed project" nor has OCSE given notice that it intends to do so; and
4. The Agencies' "scheduling claims" are premature since the Agencies have failed to exhaust the dispute resolution process set forth in the Contract before asserting these claims.

DECISION

While the South Carolina Rules of Civil Procedure (and the Rules of Evidence) have no application to the process established by Section 11-35-4230, they can provide a useful framework worthy of application by analogy. HP has filed a motion to dismiss, and, accordingly, the CPO will confine his review of to the allegations set forth in the Agencies' request for resolution of a contract controversy and will presume that the facts set forth therein are true. Gressette v. South Carolina Elec. And Gas Co., 370 S.C. 377, 635 S.E.2d 538 (2006). The CPO will not dismiss the Agencies' claims if those facts and the "inferences

² The CPO notes that in a judicial forum ripeness has a constitutional character not readily applicable to the quasi-judicial administrative process.

³ In its "material breach" letter of October 15, 2012 (Case Number 2013-204A), the Agencies "request[] that the Chief Procurement Officer determine: A. Whether HPSLES breached the Contract, such that the Contract should be terminated for cause as such termination is defined in § 2.58.5 of the Contract." In his role as CPO under 11-35-4230, the CPO will neither terminate the contract himself nor decide whether or not the contract should be terminated. However, the CPO, depending on progression of this matter, may ultimately determine whether a contract has been breached, whether a legally recognized cause of action has been proven, and if so, what remedies are available. (See, generally, 11-35-4320.)

deducible” from them would entitle the Agencies to any relief. Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40 (2012).

Scheduling Claims and Damages

The Agencies’ “scheduling claims” are the heart of the Agencies’ breach of contract claim forming the basis for the Agencies’ requested relief. HP asserts that these “scheduling claims” are premature and should be dismissed for lack of ripeness. The CPO holds that Agencies’ allegations, which HP calls “scheduling claims,” are sufficient to allege a breach of contract ripe for adjudication. The Agencies’ request for resolution of a contract controversy clearly alleges that HP has breached its obligations under the contract by failing to meet the half-way point milestone towards the completion of System Test,” failing to provide a revised Project Schedule demonstrating HP’s approach to executing the remaining scripts that met the requirements of the Contract, and failing to provide a complete Requirements Traceability Matrix as required by the contract. The Agencies further allege these breaches make it impossible for HP to meet the project completion date. These allegations clearly assert these breaches have already occurred, not that they might occur in the future.⁴

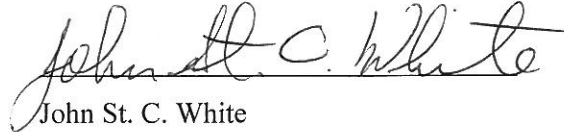
In addition to effectively alleging a breach of contract, the Agencies allege damages resulting from the breach. However, HP asserts that these alleged damages have not yet occurred, are speculative, and may never occur and are not ripe for the CPO to consider. As one might expect, the pleadings and motions show there is a dispute of fact concerning the certainty of damages. This disagreement over the certainty of damages does not provide a basis for dismissing these damage claims. Whether the Agencies have actually incurred or will in fact incur damages as a result of HP’s alleged breaches and the accuracy with which those damages may be determined is a matter which the Agencies will have the burden of proving at a hearing on the merits.

⁴ Many of the cases cited by both parties address such dissimilar facts that they have been of limited value to the CPO. A case cited by HP, *Creasman v. Dish Network*, though unpublished, did provide some guidance, though the CPO reads this case as supportive of the Agencies’ position. In that case, the court dismissed the plaintiff’s complaint for lack of standing and, effectively, as unripe. The opinion explains that the Plaintiff failed to allege a sufficiently matured harm, harm based on the application of early termination fees that would not apply unless and until the plaintiff terminated the contract. Nowhere in the opinion does the court identify any allegations of breach. In contrast, the Agencies have alleged that HP has already breached the contract and that damages have already been incurred.

As an aside, and with all due respect, opinions published by the South Carolina Procurement Review Panel are of limited value in the matter pending. South Carolina has very little case law on the procurement matters routinely addressed by the Panel. In those cases, Panel opinions are of great value, often the only precedent available. However, on many other matters, e.g., contract law, appellate judicial decisions are binding judicial precedent and the more helpful authority to code.

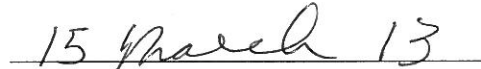
DECISION

For the foregoing reasons, the CPO denies HP's request that he dismiss the Agencies' "Scheduling Claims," and damage claims.

A handwritten signature in cursive script, reading "John St. C. White", written over a horizontal line.

John St. C. White

Chief Procurement Officer

A handwritten date "15 March 13" written in cursive script over a horizontal line.

Date

Columbia, South Carolina